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for rehearing was filed, entertained, and denie November 21, 1925. (R. 141.) Petition for cert orari was filed pursuant to Section 240(a) of th Judicial Code as amended by the Act of Februar 13, 1925.

STATEMENT

The petitioner, Skinner and Eddy Corporatio seeks a writ of mandamus to compel the Comptrol ler General to consider and allow or disallow cer tain claims or credits asserted by the petitione against the United States, arising out of certai contracts made between the petitioner and th Fleet Corporation, acting on behalf of the Unite States.

It appears that the United States has a sui pending against Skinner and Eddy Corporation i the United States District Court for the Weste District of Washington.[1]

Section 951 of the Revised Statutes provides:

> In suits brought by the United State against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the ac counting officers of the Treasury, for their examination, and have been by them dis allowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented

[1] The record shows this suit was threatened. (R. 4.) It has actually been commenced since this case was instituted. (R. 124.)

> from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident.

Section 305 of the Budget and Accounting Act of June 10, 1921, Chap. 18, 42 Stat. 20, 24, reads as follows:

> All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

The result of the latter statute is that claims required to be presented under Section 951 of the Revised Statutes must now be presented to the General Accounting Office, unless, as contended by the United States in this case, other provision is made by law.

In order to comply with Section 951, R. S., and put itself in a position, as it contends, to be able to prove its credits and set-offs in the aforementioned suit brought by the United States, the petitioner presented to the General Accounting Office on September 4 1924 (R. 2), its claims against the United States with a request (R. 7–10) that the Comptroller General allow or disallow them.

The Comptroller General refused to consider the claims presented or to act upon them. His refusal is not based on any defect in the manner or form in which the claims were presented, but on the ground

that subdivision (c) of Section 2 of the Merchant Marine Act of June 5, 1920, Chap. 250, 41 Stat. 988, 989, relieves the General Accounting Office from auditing, settling, and adjusting the matters here involved and places that duty on the Shipping Board.

Subdivision (c) of Section 2 of the Merchant Marine Act of 1920 reads as follows:

> As soon as practicable after the passage of this Act the board shall adjust, settle, and liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President by any such Act or parts of Acts; and for this purpose the board, instead of the President, shall have and exercise any of such powers and duties relating to the determination and payment of just compensation: *Provided*, That any person dissatisfied with any decision of the board shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed.

THE QUESTIONS

The questions presented are:

(1) Whether the duty rests upon the Comptroller General to consider and allow or disallow these claims; and

(2) Whether, assuming the duty rests upon him, the petitioner may be prevented by Section 951

of the Revised Statutes from establishing its claims for credits and set-offs, by the refusal of the General Accounting Office to consider its claims.

It is the contention of the respondent that the duty of adjusting and settling these claims does not rest upon him, but upon the Shipping Board, and that, in any event, the refusal of the General Accounting Office to consider and act upon these claims will not prevent the petitioner, under Section 951 of the Revised Statutes, from proving its credits and set-offs in the pending action brought by the United States because the petitioner is in as good position as if the General Accounting Office had considered and disallowed its claims.

ADDITIONAL FACTS

All of the contracts between the petitioner and the Fleet Corporation were entered into by the Fleet Corporation "representing the United States of America." (R. 30, 42, 59, 72, 85, 88, 102, 104.)

The first contract did not so state (R. 23), but the agreement supplemental to it did so recite. (R. 30.)

Although at the time the claims were originally presented to it the General Accounting Office assigned various reasons for its refusal to act, it does appear that it definitely refused to act on these claims, and, in its return to the order to show cause why a writ of mandamus should not issue, the Comptroller General justified his refusal to act on the ground that jurisdiction to adjust and settle the

claims had been taken from the General Accounting Office and conferred upon the Shipping Board by the Merchant Marine Act of 1920. (R. 13.)

Some of the history of this controversy is disclosed in *Ex parte Skinner and Eddy Corporation*, 265 U. S. 86, and in *United States* v. *Skinner and Eddy Corporation*, 5 F. (2d) 708.

ARGUMENT

SUMMARY

I. The duty of adjusting, settling, and allowing or disallowing claims against the United States arising out of contracts made by the Emergency Fleet Corporation on behalf of the United States, such as are here involved, rests not on the General Accounting Office, but on the Shipping Board, and consequently the Comptroller General, by refusing to consider petitioner's claims, has not failed or refused to perform any duty imposed upon him by law.

II. Even if the duty of auditing these claims rests upon the General Accounting Office, the petitioner has sufficiently complied with Section 951 of the Revised Statutes by presenting its claims. The purpose of the statute is satisfied if the claims are presented and the General Accounting Office finally refuses to act upon them as well as if it considered and disallowed them.

I

It is not the duty of the Comptroller General to settle and adjust these claims

Subdivision (c) of Section 2 of the Merchant Marine Act of 1920 set forth in the Statement of Facts took from the General Accounting Office and placed upon the Shipping Board the duty of adjusting, settling, and liquidating all " matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred " upon him by any of the Acts or parts of Acts referred to in the Merchant Marine Act of 1920.

If the contracts described in the petition for a writ of mandamus arose out of or were incident to the exercise by the President of any of the powers conferred by Acts or parts of Acts mentioned in subdivision (c) of Section 2 of the Merchant Marine Act of 1920, then, manifestly the General Accounting Office is not charged with the duty of adjusting, settling, or liquidating them; and if Section 951 of the Revised Statutes requires the petitioner to present these claims to any accounting officer for allowance or disallowance as a condition precedent to proving the claims or credits in the suit brought against it by the United States, the presentation should be made to the Shipping Board, which is charged with the duty of adjusting, settling, and liquidating them.

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The Acts, or parts of Acts, referred to in subdivision (c) of Section 2 of the Merchant Marine Act of 1920 are disclosed by the following review of the Shipping Acts:

The Shipping Board was organized by authority of the Act of September 7, 1916, chap. 451 (39 Stat. 728). By Section 4, it was provided that "the Auditor for the State and Other Departments shall receive and examine all accounts of expenditures of the board."

Section 5 (repealed by the Merchant Marine Act of 1920) provided:

> That the board, with the approval of the President, is authorized to have constructed and equipped in American shipyards and navy yards or elsewhere, giving preference, other things being equal, to domestic yards, or to purchase, lease, or charter, vessels suitable, as far as the commercial requirements of the marine trade of the United States may permit, for use as naval auxiliaries or Army transports, or for other naval or military purposes, and to make necessary repairs on and alterations of such vessels • • •.

The authority for the organization of the Fleet Corporation is Section 11 of the Act of 1916 which provides:

> That the Board, if in its judgment such action is necessary to carry out the purpose of this Act, may form under the laws of the District of Columbia one or more corporations for the purchase, construction • • •

> of merchant vessels in the commerce of the United States. At the expiration of five years from the conclusion of the present European war the operation of vessels on the part of any such corporation in which the United States is then a stockholder shall cease * * *. The vessels or other property of such corporation shall revert to the board.

The Fleet Corporation was organized under this authority with a capital stock of $50,000,000.

By the Emergency Shipping Fund provisions of the Act of Congress approved June 15, 1917, chap. 29 (40 Stat. 182), as amended, it was provided:

> 1. The President is hereby authorized and empowered, within the limits of the amounts herein authorized—
>
> (a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.
>
> (b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material or take possession, lease, or assume control of, any street railroad, interurban railroad, or part thereof, cars and other equipment necessary to operation.
>
> (c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal

of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(d) To acquire, construct, establish, or extend any plant, and in pursuance thereof, to purchase, requisition, or otherwise acquire title to or use of land improved or unimproved or interest therein; and to requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

The President may exercise the power and authority hereby vested in him and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time.

By Executive Order No. 2664, dated July 11, 1917, the President delegated powers to the Emergency Fleet Corporation as follows:

I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, purchase or requisitioning of vessels in process of construction * * * and all power and authority applicable to and in furtherance

> of the production, purchase, and requisitioning of materials for ship construction.

The Emergency Shipping Fund provisions, *supra*, were amended by the Acts of April 22, 1918, chap. 62 (40 Stat. 535), and by the Act of November 4, 1918, chap. 201 (40 Stat. 1020, 1022), which are not material for present purposes. By Executive Order No. 2888, dated June 18, 1918, the President delegated to the Fleet Corporation the powers under the amending Act of April 22, 1918.

By Executive Order No. 3018, dated December 3, 1918, the President, by a reference to the several Acts, including the amendment of November 4, 1918, again delegated to the Fleet Corporation "all power and authority now vested in me by said laws with reference to any and all activities which may be directly or indirectly applicable to ship or plant construction * * *." Section 3 provides:

> All acts heretofore done by said Corporation or by said Board, with reference respectively to the kinds of power or authority herein delegated to each, and which could have been properly done by me under such statutes or any of them, be, and they are hereby, ratified and confirmed.

This fairly reviews the authority under which the construction contracts were made between the Fleet Corporation and the Skinner & Eddy Corporation. From the transcript of record, only one construction contract was executed prior to the Act of June 15, 1917, and the Executive Order of July

11, 1917, and apparently is with the corporation in its corporate capacity. However, a supplemental agreement amending this contract was entered into on February 16, 1918, between Skinner & Eddy and the Fleet Corporation representing the United States. All the subsequent contracts were made by the Fleet Corporation " representing the United States."

It is understood that all construction contracts made subsequent to July 11, 1917, were made by the Fleet Corporation representing the President under authority of the Act of June 15, 1917, as amended, and the several Executive Orders relating thereto and that payments for such constructions were made out of appropriations made available to the President for that purpose.

The Fleet Corporation may, in some of its activities, have made contracts in its own right, and in other cases have acted in a representative capacity for the United States. The contracts of the petitioner were made in a representative capacity.

These Acts, above reviewed, are the legislative authority for the construction contracts between the Skinner and Eddy Corporation and the Fleet Corporation. Subdivision (c) of Section 2, of the Act of 1920, above quoted, specifically places the adjustment, settlement, and liquidation of such construction claims with the Shipping Board.

Whether the claims and causes of action involved in the suit brought by the United States against the Skinner and Eddy corporation were claims

originally owned by the Fleet Corporation and assigned to the United States or whether they have always belonged to the United States by reason of the fact that in this case the Fleet Corporation acted as agent for the United States and not in its own right, is immaterial. The contracts referred to plainly arose out of or were incident to the exercise by or through the President of powers conferred upon him by the statutes referred to in subdivision (c) of Section 2 of the Merchant Marine Act of 1920, and the General Accounting Office was by that Act relieved of the duty of settling and adjusting them and allowing or disallowing any claims against the United States in the way of credits or set-offs, or otherwise, arising out of these contracts.

II

The purpose of section 951 of the Revised Statutes has been accomplished

The petitioner was not entitled to a mandamus merely upon a showing that the General Accounting Office has refused to perform a duty imposed upon it by law. In order to entitle the petitioner to relief, it was necessary for it to go further and show that it had been left in a position where it would not be allowed to offer evidence in support of its credits and set-offs in its defense of the suit brought against it by the United States. It occurs to us, considering the purpose of, and the underlying reasons for the enactment of Section 951 of

the Revised Statutes, that a sufficient compliance with that statute results from a presentation of the claims to the proper officers and their refusal to consider them.

The leading case on the purpose of Section 951 of the Revised Statutes (originally enacted as the Act of March 3, 1797, c. 20, Sec. 4; 1 Stat. 512, 515) is *Cox* v. *United States*, 6 Pet. 172, in which it was said, on page 201:

> The law was intended for real and substantial purposes; that the United States should not be surprised by claims for credits, which they might not be able to meet and explain in the hurry of a trial.

In *United States* v. *Hawkins*, 10 Pet. 125, 133, it was said that the statute "guards the district attorney from surprise, by informing him, through the treasury department, before the time of trial, of the credits which have been claimed, and the reasons for the rejection of them."

In *United States* v. *Fisher Flouring Mills Co.* (D. C., W. D. Wash.), 295 Fed. 691, the court quoted the above passage from *Cox* v. *The United States*, and added (p. 694):

> It may be that Congress also intended that the accounting officers of the United States, if upon investigation of the claim asserted as a set-off it was found to be meritorious, should have an opportunity to adjust the differences and save the United States the expense of litigation.

In *Alexander* v. *United States* (C. C. A. 9th Circ.), 57 Fed. 828, is was said, on page 833, that the statute "evidently was designed to prevent the introduction of evidence to reduce the liability of individuals in cases of this kind until the department should have had an opportunity to examine into the nature of the claim, and reject or allow the same."

It has been held that, while no particular form is essential to the allowance or disallowance of a claim, a mere suspension of action is not a disallowance. *Yates* v. *United States* (C. C. A. 9th Circ.), 90 Fed. 57.

In *United States* v. *Fletcher*, 147 U. S. 664, the claim in question was one sought to be enforced against the United States in a United States Circuit Court sitting as a Court of Claims and not one for a credit in a suit brought by the United States, but the court referred to section 951 by way of analogy and, after stating that presentment of a claim to an executive department was not a prerequisite to suit against the United States, said (p. 667):

> But if such claims are presented to the department for allowance, and the department, in the exercise of its discretion, suspends action upon them until proper vouchers are furnished, or other reasonable requirements are complied with, the courts should not assume jurisdiction until final action is taken. So long as the claim is pending and awaiting

final determination in the department, cour
should not be called upon to interfere,
least unless it ignores such claim or fai
to pass upon it within a reasonable time.

In *United States* v. *Hawkins*, 10 Pet. 125, it wa
held that a claim for credit, in order to be consi
ered in a suit brought by the United States, nee
not be presented to the Treasury and disallowe
before the commencement of the suit. But in tha
case the Supreme Court had reversed a judgmen
with directions to award a venire *facias de nov*
Upon the return of the mandate, one of the de
fendants petitioned the District Court to be allowe
to file a supplemental answer, pleading a set-off o
claims which he stated had been presented and dis
allowed at the Treasury Department, and the onl
question before the Court was whether the petitio
should have been granted.

In several cases demurrers to pleadings hav
been sustained on the ground that the pleadings di
not allege compliance with Section 951 of the Re
vised Statutes.

Ware v. *United States*, 4 Wall. 617, 63
United States v. *Cantrall* (C. C., Dist
Oregon), 176 Fed. 949.
United States v. *Fisher Flouring Mill
Co.* (Dist. Ct., West. Dist. Wash.) 295 Fed
691.

The statute has also been considered in the fol
lowing cases:

United States v. *Wilkins*, 6 Wheat. 135,
143.

United States v. *Giles*, 9 Cranch, 212.
Watkins v. *United States*, 9 Wall. 759.
Smythe v. *United States*, 188 U. S. 156, 173.
United States v. *Macdaniel*, 7 Pet. 1.
United States v. *Kimball*, 101 U. S. 726.

If the purpose of Section 951 of the Revised Statutes was to warn the United States in advance of the trial of the fact that credits and set-offs are to be asserted against it and advise the United States of their nature, that purpose has been served, if it was the duty of the Comptroller General to consider these claims, by the presentation of them to the General Accounting Office. It is stretching the statute to unreasonable limits to construe it as prohibiting the petitioner from being allowed to establish its credits and set-offs against the United States unless it follows up its presentation and the refusal of the Comptroller General to act, by carrying to the court of last resort a petition for a writ of mandamus to compel him to act and allow or disallow the claims.

If this Court declines to issue the writ of certiorari it will appear that the petitioner has exhausted every means open to it to procure a consideration of its claims by the accounting officers.

The latter part of Section 951 of the Revised Statutes excuses a claimant from showing that his claims for credits have been presented to the accounting officers of the Treasury for their examination and allowance or disallowance, if it appears

to the satisfaction of the court that the defendant was prevented from exhibiting his claim for such credits at the Treasury by lack of vouchers or by absence from the United States or " by some unavoidable accident." If these grounds are sufficient excuse for not procuring allowance or disallowance of its credits, surely the petitioner may not be deprived of its right to establish its credits and set-offs where it is able to show to the trial court that it duly presented its claims; that the accounting officers finally and definitely refused to consider them on the ground that they had no statutory authority to do so, and where it further appears that the petitioner prosecuted through two courts unsuccessfully, a petition for a mandamus to compel the accounting officers to act.

In the case of *United States* v. *Fisher Flouring Mills Co.*, 295 Fed. 691, which held that in a suit by the United States on a cause of action assigned to it by the Fleet Corporation the defendant was not entitled to plead a set-off by the Fleet Corporation which had not been presented to the accounting officers of the Treasury, as required by Section 951 of the Revised Statutes, it did not appear that the claim had actually been presented to the accounting officers and that the accounting officers had definitely declined to consider it, nor does it appear from the opinion in that case that the point was raised that the Merchant Marine Act of 1920 had taken from the General Accounting Office and conferred upon the Shipping Board the

duty of adjusting and settling claims such as those here presented.

CONCLUSION

It is clear, first, that the Comptroller General is not charged by law with the duty of settling and adjusting the petitioner's claims; that the duty to adjust and settle them rests with the Shipping Board, and, second, in any event, if the duty of considering these claims rests upon the General Accounting Office, as the petitioner has presented its claims to that office and that office has finally refused to consider them on the ground that it has not jurisdiction to do so, petitioner will not be deprived by Section 951 of the Revised Statutes of the right to offer evidence to establish its credits and set-offs in the pending suit against it by the United States.

The decision of the Court of Appeals of the District of Columbia was right, although we are unable to support the reason assigned for it in the last paragraph of the opinion. (R. 125.)

The application to this Court for a writ of certiorari is the result of an overabundance of caution on the part of the petitioner.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
R. E. GOLZE, *Solicitor.*
M. E. RHODES, *Counsel.*

JANUARY, 1926.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 257

THE UNITED STATES EX REL. SKINNER AND EDDY Corporation, Petitioner

v.

J. R. McCARL, COMPTROLLER GENERAL OF THE United States

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE COMPTROLLER GENERAL

OPINION BELOW

The Supreme Court of the District of Columbia filed no opinion. The opinion of the Court of Appeals of the District of Columbia is reported in 8 F. (2d) 1011. (R. 123.)

JURISDICTION

The judgment of the Court of Appeals of the District of Columbia was entered on November 2, 1925. (R. 125.) Motion for rehearing was filed, entertained, and denied November 21, 1925. (R. 125.) The petition for certiorari was filed Decem-

ber 18, 1925, and granted on January 18, 1926 (R. 125, 126), pursuant to Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

THE QUESTIONS PRESENTED

The petitioner, Skinner and Eddy Corporatiaon, seeks a writ of mandamus to compel the Comptroller General to consider and allow or disallow a certain claim or credit asserted by the petitioner arising out of certain contracts made between the petitioner and the United States Shipping Board Emergency Fleet Corporation, representing the United States. The Comptroller General has refused to act upon the claim on the ground that he has no jurisdiction over it. The questions presented are:

(1) Whether, assuming that the Comptroller General has jurisdiction over the claim, its presentation to him, followed by his refusal to act upon it, is not such a compliance with Section 951 of the Revised Statutes as to permit the petitioner to introduce proof of the claim in the trial of any suit now pending or hereafter brought by the United States against the petitioner.

(2) Whether the duty to consider and act upon the claim rests upon the Comptroller General under Section 305 of the Budget and Accounting Act of June 10, 1921, c. 18, 42 Stat. 20, 24, or upon the Shipping Board under Subdivision (c) of Section 2 of the Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, 989.

STATUTES INVOLVED

Section 951 of the Revised Statutes is as follows:

> In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident.

Section 305 of the Budget and Accounting Act of June 10, 1921, c. 18, 42 Stat. 20, 24 (amending Section 236, R. S.), is as follows:

> All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.

Subdivision (c) of Section 2 of the Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, 989, is as follows:

> As soon as practicable after the passage of this Act the board shall adjust, settle, and liquidate all matters arising out of or incident to the exercise by or through the Presi-

dent of any of the powers or duties conferre
or imposed upon the President by any suc
Act or parts of Acts; and for this purpos
the board, instead of the President, sha
have and exercise any of such powers an
duties relating to the determination and pay
ment of just compensation: *Provided,* Tha
any person dissatisfied with any decision o
the board shall have the same right to su
the United States as he would have had i
the decision had been made by the Presider
of the United States under the Acts hereb
repealed.

STATEMENT

The petitioner, Skinner and Eddy Corporatio
brought this proceeding for a writ of mandamus t
compel the Comptroller General to consider and a
upon a claim of the petitioner against the Unite
States, amounting to $32,354,387.47. (R. 1–5
This claim arose out of certain contracts betwe
the petitioner and the Emergency Fleet Corpor
tion (R. 3, 14), and was submitted to the Gener
Accounting Office on September 4, 1924. (R. 2, 12
The Comptroller General first refused to tak
action upon the claim until after final determin
tion of a suit pending in the United States Distri
Court for the Western District of Washingto
Northern Division, brought by the petition
against the Emergency Fleet Corporation and i
volving the subject matter of the claim. (R. 6–7
Subsequently, however, the Comptroller Gener
based his refusal to act upon the claim also up
the ground that jurisdiction to settle and adju

the claim had been taken from the General Accounting Office and conferred upon the Shipping Board by the Merchant Marine Act of 1920. (R. 13, 18, 119–120.)

All of the contracts out of which the claim in question arose, except the first one (R. 23), recited that they were between the petitioner and the Fleet Corporation, "representing the United States of America" (R. 30, 42, 59, 72, 85, 88, 102, 104), and the first contract was amended by a supplemental contract containing such a recital. (R. 30.)

The petitioner bases its contention that it is entitled to a writ of mandamus wholly upon the argument that unless the Comptroller General formally disallows the petitioner's claim, it will be prevented under Section 951 of the Revised Statutes from proving the claim as a credit in litigation by the United States against it. The petition alleged that such litigation was threatened (R. 4), and it has since actually been commenced (R. 124).

The Supreme Court of the District of Columbia sustained a demurrer to the petitioner's plea and traverse to the respondent's answer, and dismissed the suit (R. 120), and the judgment of the Supreme Court was affirmed by the Court of Appeals (R. 125).

SUMMARY OF ARGUMENT

I. On the assumption the claim is within the jurisdiction of the Comptroller General, the petitioner is not entitled to a writ of mandamus unless further action by the Comptroller General is neces-

sary under Section 951 of the Revised Statutes in order to permit the petitioner to assert its claim as a credit in the litigation now pending, or subsequent litigation, brought against it by the United States. No such further action is necessary; the purpose of Section 951, which is to give notice to the United States and enable it to prepare to meet claims, has been satisfied by the presentation of the claim to the General Accounting Office, followed by the Comptroller General's refusal to act upon it.

II. The duty of adjusting, settling, and liquidating claims against the United States arising out of contracts made by the Emergency Fleet Corporation on behalf of the United States, such as the claim here involved, rests not on the General Accounting Office, but on the Shipping Board, and consequently the Comptroller General in refusing to consider the petitioner's claim has not failed or refused to perform any duty imposed upon him by law.

ARGUMENT

I

IF THE COMPTROLLER GENERAL HAS JURISDICTION OVER THE MATTER, THE PURPOSE OF SECTION 951 OF THE REVISED STATUTES HAS BEEN SATISFIED BY THE PRESENTATION OF THE PETITIONER'S CLAIM TO THE GENERAL ACCOUNTING OFFICE, FOLLOWED BY THE COMPTROLLER GENERAL'S REFUSAL TO ACT UPON IT

The petitioner throughout this proceeding has based its contention that it is entitled to a writ of mandamus wholly upon the argument that formal

disallowance of its claim by the Comptroller General is necessary as a prerequisite to setting up such claim as a credit in litigation brought by the United States. In the Addenda to the petitioner's brief in this Court it is stated that if the petitioner is entitled to prove its credits in the present or a future action brought by the United States, "without further action by the Comptroller General, then the whole purpose of this litigation will be accomplished by a holding of this Court to that effect."

Moreover, mandamus is an extraordinary remedial process and should not be awarded if the petitioner is free to litigate its claim in the suit brought by the United States and now pending, or any other suit which may hereafter be brought by the United States. *Reeside* v. *Walker*, 11 How. 272, 291–292; *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86.

It appears to us that, considering the purpose of Section 951 of the Revised Statutes, a sufficient compliance with the section results from a presentation of a claim to the proper officers and their refusal to consider it. The claim is "disallowed," within the meaning of the statute, when the accounting officers refuse to allow it, whether such refusal rests upon supposed lack of jurisdiction or determination after consideration of the claim that it is without merit.

The leading case on the purpose of Section 951 of the Revised Statutes (originally enacted as the Act of March 3, 1797, c. 20, Sec. 4, 1 Stat. 512,

515) is *Cox* v. *United States*, 6 Pet. 172, in which it was said, on page 202:

> The law was intended for real and substantial purposes; that the United States should not be surprised by claims for credits, which they might not be able to meet and explain in the hurry of a trial.

To the same effect is *United States* v. *Standard Aircraft Corporation*, 16 F. (2d) 307.

In *United States* v. *Hawkins*, 10 Pet. 125, 133, it was said that the statute "guards the district-attorney from surprise, by informing him, through the treasury department, before the time of trial, of the credits which have been claimed, and the reasons for the rejection of them."

In *United States* v. *Fisher Flouring Mills Co.* (D. C., W. D., Wash.), 295 Fed. 691, the court quoted the above passage from *Cox* v. *United States*, and added (p. 694):

> It may be that Congress also intended that the accounting officers of the United States, if upon investigation of the claim asserted as a set-off it was found to be meritorious, should have an opportunity to adjust the differences and save the United States the expense of litigation.

In *Alexander* v. *United States* (C. C. A. 9th Circ.), 57 Fed. 828, it was said, on page 833, that the statute "evidently was designed to prevent the introduction of evidence to reduce the liability of individuals in cases of this kind until the department should have had an opportunity to examine

into the nature of the claim, and reject or allow the same."

It has been held that, while no particular form is essential to the allowance or disallowance of a claim, a mere suspension of action is not a disallowance. *Yates* v. *United States* (C. C. A. 9th Circ.), 90 Fed. 57.

In *United States* v. *Patterson* (C. C. S. D. Iowa), 91 Fed. 854, 856, after referring to Section 951, the court said:

> Manifestly it is but just that the government shall have opportunity to examine into the credits which an agent or other disbursing officer of the government claims to be properly allowable in his behalf, as against money or property placed under his charge. Frequently the place where this credit is claimed to have been earned or to have become due is on the frontier, among Indian tribes, in distant ports, or in other places not easily accessible; or the government may find the tracing out of this credit claim—the ascertainment of the surrounding facts—a difficult matter. Thus, it is but just that the government be informed, and have opportunity of ascertaining the correctness of the claim. If found correct, it is to be presumed that the claim will be allowed, and, as to such, litigation rendered unnecessary. And, if not found correct, there is yet reserved in court, to the agent or official, when sued, his opportunity of pressing the claim for credit, thus disallowed by the department.

In *United States* v. *Fletcher*, 147 U. S. 664, the claim in question was one sought to be enforced against the United States in a United States Circuit Court sitting as a Court of Claims and not one for a credit in a suit brought by the United States, but the court referred to Section 951 by way of analogy and, after stating that presentment of a claim to an executive department was not a prerequisite to suit against the United States, said (p. 667):

> But if such claims are presented to the department for allowance, and the department, in the exercise of its discretion, suspends action upon them until proper vouchers are furnished, or other reasonable requirements are complied with, the courts should not assume jurisdiction until final action is taken. So long as the claim is pending and awaiting final determination in the department, courts should not be called upon to interfere, at least, unless it ignores such claim or fails to pass upon it within a reasonable time.

Section 951 has also been considered in the following cases, none of which throw any light on the question here presented:

Ware v. *United States*, 4 Wall. 617, 630.

United States v. *Cantrall*, 176 Fed. 949.

United States v. *Wilkins*, 6 Wheat. 135, 143.

United States v. *Giles*, 9 Cranch, 212.

Watkins v. *United States*, 9 Wall. 759.

United States v. *Macdaniel*, 7 Pet. 1.
United States v. *Kimball*, 101 U. S. 726.
Smythe v. *United States*, 188 U. S. 156, 173.

If the purpose of Section 951 of the Revised Statutes was to warn the United States in advance of the trial of the fact that credits and set-offs are to be asserted against it and advise the United States of their nature, that purpose has been served, if it was the duty of the Comptroller General to consider these claims, by the presentation of them to the General Accounting Office. It is stretching the statute to unreasonable limits to construe it as prohibiting the petitioner from being allowed to introduce evidence to establish its credits and set-offs against the United States unless it follows up its presentation and the refusal of the Comptroller General to act by carrying to the court of last resort a petition for a writ of mandamus to compel him to act and allow or disallow the claims.

The latter part of Section 951 of the Revised Statutes excuses a claimant from showing that his claim for credit has been presented to the accounting officers of the Treasury for their examination and allowance or disallowance if it appears to the satisfaction of the court that the defendant was prevented from exhibiting his claim at the Treasury by lack of vouchers or by absence from the United States or "by some unavoidable accident." If these grounds are sufficient excuse for not exhibit-

ing a claim at the Treasury, surely the petitioner may not be deprived of its right to establish its claim where it is able to show to the trial court that it duly presented its claim and that the accounting officers finally and definitely refused to consider it on the ground that they had no statutory authority to do so.

Moreover, considering the purpose of the statute, we think it clear that the word "disallow," as used in Section 951 of the Revised Statutes, means no more than a definite refusal to allow and carries no implication that such refusal must be based upon consideration and rejection of the merit of the claim presented. See *Dix* v. *Dix*, 132 Ga. 630, 631; *Skilton* v. *Codington*, 105 App. Div. (N. Y.) 616, 617; *Pepper* v. *Warren*, 2 Marv. (Del.) 225; *Warner* v. *Supervisors of Outagamie Co.*, 19 Wis. 611, 613.

The United States has never asserted that by virtue of Section 951 the petitioner is not entitled to prove its claim in the pending litigation with the United States. On the contrary it has admitted and now admits that if the matter is one within the jurisdiction of the Comptroller General, rather than of the Shipping Board, the presentation of the claim may be considered as satisfying the requirements of Section 951.

II

IT IS NOT THE DUTY OF THE COMPTROLLER GENERAL TO SETTLE AND ADJUST THE PETITIONER'S CLAIM, AND CONSEQUENTLY HE CAN NOT BE COMPELLED TO CONSIDER AND ACT UPON THE CLAIM

Section 305 of the Budget and Accounting Act of 1921, which provides that all claims and demands of or against the United States shall be settled and adjusted in the General Accounting Office, is an amendment of Section 236 of the Revised Statutes, which provided for such settlement and adjustment by the Department of the Treasury. Subdivision (c) of Section 2 of the Merchant Marine Act of 1920 provides that the Shipping Board shall adjust, settle, and liquidate "all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed" upon him by any of the Acts or parts of Acts referred to in Subdivision (c) of Section 2 of the Merchant Marine Act of 1920.

It is a well-settled rule of statutory construction "that general and specific provisions, in apparent contradiction, whether in the same or different statutes, and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general." *Townsend* v. *Little*, 109 U. S. 504, 512. See also *Rodgers* v. *United States*, 185 U. S. 83, 87-88; *Washington* v. *Miller*, 235 U. S. 422, 428.

It follows that if the contracts described in the petition for a writ of mandamus arose out of or

were incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon him by any of the Acts or parts of Acts referred to in Subdivision (c) of Section 2 of the Merchant Marine Act of 1920, then the Shipping Board, and not the General Accounting Office, has the power and duty to adjust, settle, and liquidate them.

The fact that the Budget and Accounting Act of 1921 was enacted later than the Merchant Marine Act of 1920 is of no consequence. The former Act was only intended to amend an earlier statute by transferring settlement of accounts from the Treasury to the Comptroller General, and not to vest in the latter power which had been taken from the Treasury by the Merchant Marine Act of 1920.

The Acts, or parts of Acts, referred to in subdivision (c) of Section 2 of the Merchant Marine Act of 1920 may be summarized as follows:

The Shipping Board was organized by authority of the Act of September 7, 1916, c. 451, 39 Stat. 728.

Section 5 (repealed by the Merchant Marine Act of 1920) provided (p. 730):

> That the board, with the approval of the President, is authorized to have constructed and equipped in American shipyards and navy yards or elsewhere, giving preference, other things being equal, to domestic yards, or to purchase, lease, or charter, vessels suitable, as far as the commercial requirements of the marine trade of the United States may

> permit, for use as naval auxiliaries or Army transports, or for other naval or military purposes, and to make necessary repairs on and alterations of such vessels * * *.

The authority for the organization of the Fleet Corporation is Section 11 of the Act of 1916 which provides:

> That the board, if in its judgment such action is necessary to carry out the purposes of this Act, may form under the laws of the District of Columbia one or more corporations for the purchase, construction * * * of merchant vessels in the commerce of the United States. * * *
>
> At the expiration of five years from the conclusion of the present European war the operation of vessels on the part of any such corporation in which the United States is then a stockholder shall cease * * *. The vessels and other property of any such corporation shall revert to the board. * * *

The Fleet Corporation was organized under this authority with a capital stock of $50,000,000.

By the Emergency Shipping Fund provisions of the Act of Congress approved June 15, 1917, c. 29, 40 Stat. 182, as amended by the Act of April 22, 1918, c. 62, 40 Stat. 535, and by the Act of November 4, 1918, c. 201, 40 Stat. 1020, 1022, it was provided:

> 1. The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the war and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, production, or purchase of ships or material or take possession, lease or assume control of, any street railroad, interurban railroad, or part thereof, cars and other equipment necessary to operation.

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output or part thereof in such quantities and at such times as may be specified in the order.

(d) To acquire, construct, establish, or extend any plant, and in pursuance thereof, to purchase, requisition, or otherwise acquire title to or use of land improved or unimproved or interest therein; and to requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

* * * * *

The President may exercise the power and authority hereby vested in him, and expend

> the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time * * *.

By Executive Order No. 2664, dated July 11, 1917, the President delegated powers to the Emergency Fleet Corporation as follows:

> I hereby direct that the United States Shipping Board Emergency Fleet Corporation shall have and exercise all power and authority vested in me in said section of said act, in so far as applicable to and in furtherance of the construction of vessels, purchase or requisitioning of vessels in process of construction * * * and all power and authority applicable to and in furtherance of the production, purchase, and requisitioning of materials for ship construction.

By Executive Order No. 2888, dated June 18, 1918, the President delegated to the Fleet Corporation the powers under the amending Act of April 22, 1918.

By Executive Order No. 3018, dated December 3, 1918, the President, by a reference to the several Acts, including the amendment of November 4, 1918, again delegated to the Fleet Corporation "all power and authority now vested in me by said laws with reference to any and all activities which may be directly or indirectly applicable to ship or plant construction * * *." Section 3 provides:

> All acts heretofore done by said Corpora
> tion or by said Board, with reference respec
> tively to the kinds of power or authorit
> herein delegated to each, and which coul
> have been properly done by me under suc
> statutes or any of them, be, and they ar
> hereby, ratified and confirmed.

The contracts described in the petition for a wri of mandamus arose out of the exercise by or through the President of the powers or duties conferred o imposed upon him by the Acts referred to above Only one of the contracts was executed prior t the Act of June 15, 1917, and the Executive Orde of July 11, 1917, and was not specifically made b the Fleet Corporation as the representative of th United States. A supplemental contract amendin this contract, and all of the subsequent contracts were made by the Fleet Corporation "representin the United States."

In *The Lake Monroe*, 250 U. S. 246, this Cour said that the Fleet Corporation was but an operat ing agency of the Shipping Board, financed wit public funds. In *United States* v. *Walter*, 263 U. S 15, it was said that the Fleet Corporation was a instrumentality of the Government. Cf. *U. S Grain Corp.* v. *Phillips*, 261 U. S. 106; *Clallam County* v. *United States*, 263 U. S. 341. Most, i not all, of the funds available to the Fleet Corpora tion for ship construction were received by i through the President, and Congress probably in tended that all such contracts should be adjusted

settled, and liquidated by the Shipping Board. There can, at any rate, be no question of such intention with respect to contracts in making which the Fleet Corporation was expressly "representing the United States."

That the Shipping Board is to adjust, settle, and liquidate all contracts of the Fleet Corporation, and that the jurisdiction of the General Accounting Office is confined to auditing the transactions of the Fleet Corporation, and in such audit giving effect to the settlements made by the Shipping Board, is the inference to be drawn from the provisions of the Act of July 1, 1918, c. 113, 40 Stat. 634, 651, authorizing and directing the Secretary of the Treasury, and the provisions of the Act of March 20, 1922, c. 104, 42 Stat. 437, 444, authorizing and directing the Comptroller General "to cause an audit to be made of the financial transactions" of the Fleet Corporation.

In the case of *United States* v. *Fisher Flouring Mills Co.*, 295 Fed. 691, which held that in a suit by the United States on a cause of action assigned to it by the Fleet Corporation the defendant was not entitled to plead a set-off by the Fleet Corporation which had not been presented to the accounting officers of the Treasury, as required by Section 951 of the Revised Statutes, it did not appear that the claim had actually been presented to the accounting officers and that the accounting officers had definitely declined to consider it, nor does it

appear from the opinion in that case that the poin
was raised that the Merchant Marine Act of 192
had taken from the General Accounting Office an
conferred upon the Shipping Board the duty o
adjusting and settling claims such as those her
presented.

Whether the claims and causes of action involve
in the suit brought by the United States agains
the petitioner were claims originally owned by th
Fleet Corporation and assigned to the Unite
States or whether they have always belonged to th
United States by reason of the fact that the Fle
Corporation acted as agent for the United State
and not in its own right is immaterial. It is als
immaterial whether the Fleet Corporation is itsel
bound by the contracts made by it as agent for th
United States. The contracts referred to in th
petition for a writ of mandamus plainly arose ou
of or were incident to the exercise by or throug
the President of the powers conferred upon him b
the statutes referred to in Subdivision (c) of Se
tion 2 of the Merchant Marine Act of 1920, and th
Shipping Board, and not the General Accountin
Office, has the authority and duty to settle an
adjust them and to allow or disallow any claim
against the United States in the way of credits o
set-offs, or otherwise, arising out of the contracts.

It is, of course, obvious that if the Comptrolle
General has no jurisdiction to allow or disallow th
claims in question, he can not be compelled b
mandamus to act upon them.

CONCLUSION

If the Comptroller General has jurisdiction of these claims, their presentation to him, followed by his refusal to act, was a sufficient compliance with Section 951, R. S., and the petitioner is entitled to offer proof of them in litigation with the United States. The alternative is that the Comptroller General has no jurisdiction to act on these claims.

In the one case the petitioner does not need a writ of mandamus and in the other the petitioner is not entitled to it. We do not rely on the ground stated at the end of the opinion of the Court of Appeals.

The judgment of the Court of Appeals of the District of Columbia should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.
GARDNER P. LLOYD,
Special Assistant to the Attorney General.

MARCH, 1927.

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